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No. 02-935

IN THE

Supreme Court of the United States

A WOMAN'S CHOICE-EAST SIDE WOMEN'S CLINIC, *et al.*,
Petitioners,

v.

CARL J. BRIZZI, in his official capacity as Prosecuting Attorney for Marion County, and GREGORY WILSON, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether Indiana may require women to obtain in-person counseling eighteen hours before having an abortion in light of the fact that *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), already upheld a similar requirement and in light of a record that contains (a) no evidence concerning the impact of the in-person requirement in Indiana and (b) no explanation as to how such a requirement could impose an "undue burden."

PARTIES TO THE PROCEEDINGS

The Petitioners are several abortion clinics and a physician: A Woman's Choice East-Side Women's Clinic, Indianapolis Women's Facility, A Clinic for Women, Inc., Planned Parenthood of Central and Southern Indiana, Inc., Fort Wayne Women's Health Organization, Ulrich G. Klopfer, D.O., Women's Pavilion, Inc. and Friendship Family Planning Clinic of Indiana.

The Respondents are a class of all Indiana prosecuting attorneys, in their official capacities, with the Marion County prosecuting attorney as class representative, and the Commissioner of the Indiana Department of Health, Gregory Wilson, M.D., in his official capacity. The defendant prosecuting attorney class representative formerly was Marion County Prosecutor Scott C. Newman. However, on January 1, 2003, Carl J. Brizzi succeeded Mr. Newman as Marion County Prosecutor. Pursuant to Supreme Court Rule 35.3, Mr. Brizzi is automatically substituted for Mr. Newman.

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STATEMENT

In the decision below, the Seventh Circuit reached the unremarkable conclusion that, in order for Indiana's in-person abortion counseling requirement to constitute an "undue burden" under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), it must be judged by its actual effects in Indiana, not by a similar law's impact in another state. Pet. App. A-16-17. The Seventh Circuit's holding reversed the district court's conclusion that, notwithstanding the fact that *Casey* itself had *upheld* an in-person counseling requirement, Indiana's law could be enjoined based on the impact of similar laws in Mississippi and Utah, even without an explanation as to *how* the law could impose an undue burden. Pet. App. A-14, A-16-17, A-111, A-118.

In the guise of manufacturing some inconsistency between the decision below and *Casey*, the Petition merely raises a garden-variety dispute over the level of deference a court of appeals should give to a district court's conclusions concerning the legal significance of historical facts. Petitioners urge the Court to adopt a rule that renders such district court conclusions nearly impregnable. This issue is both unworthy of the Court's attention and already resolved by the Court's holdings in other areas of the law. Unless *all* lower court decisions that uphold state abortion regulations are sufficiently important to merit Supreme Court review, there is nothing in the Seventh Circuit's decision that justifies granting certiorari.

1. In 1992, in its landmark *Casey* decision, the Court upheld Pennsylvania's abortion waiting period and informed consent requirements. In particular, *Casey* upheld a Pennsylvania requirement that a pregnant woman receive specified information about her pregnancy and planned abortion at least twenty-four hours before having an abortion, even though that would require the woman to make "at least two visits to the doctor." 505 U.S. at 886.

According to the joint opinion in *Casey*, "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Id.* at 885. The joint opinion also observed that this decision was based "on the record before us, and in the context of this facial challenge . . . ." *Id.* at 887.

2. In 1995, the Indiana General Assembly enacted its own abortion informed consent requirement in order to ensure sound medical practice and to inform women about and persuade them not to have abortions. Public Law 187-1995 requires that specified medical personnel provide particular information to a pregnant woman, in her presence, at least eighteen hours before she has an abortion. Ind. Code § 16-34-2-1.1. This requirement expressly does not apply "in the case of a medical emergency . . . ." *Id.* The Indiana Supreme Court has interpreted this exception to "excuse[] a woman from the informed consent requirement when there is a significant threat to her life or health, physical and mental." *A Woman's Choice East-Side Women's Clinic v. Newman*, 671 N.E.2d 104, 111 (Ind. 1996).

The information to be given in-person in non-emergency situations consists of (1) the name of the physician performing the abortion; (2) the nature of the proposed procedure or treatment; (3) the risks and alternatives to the procedure and treatment; (4) the probable gestational age of the fetus (including an offer to provide a picture or drawing of a fetus, the dimensions of the fetus, and information concerning the potential survival of an unborn fetus at that stage of development); and (5) the medical risks associated with carrying a fetus to term. Ind. Code § 16-34-2-1.1. The law permits this information to be given to the woman by either the physician who is to perform the abortion or a woman's referring physician, or, as delegated by either of

those, a physician assistant, an advanced practice nurse, or a midwife. *Id.*

3. The requirement that the specified information be given "in the presence of the pregnant woman" is the subject of this case, but notwithstanding *Casey* it has never been permitted to go into effect. Before the law's effective date, the district court issued a temporary restraining order against enforcement of Public Law 187 in its entirety for ten days. Pet. App. A-158. The parties agreed to extend that temporary injunction pending the district court's resolution of Petitioners' motion for a preliminary injunction. Pet. App. A-159. Following a hearing, the district court entered a preliminary injunction against enforcement of Public Law 187 on November 9, 1995. Pet. App. A-155, A-236.

Because portions of the district court's preliminary injunction turned on the court's admittedly "provisional" (Pet. App. A-216-17, A-231) interpretation that the law's emergency medical exception was too narrow in light of *Casey*, the court certified to the Indiana Supreme Court the question of the proper interpretation of that part of the statute. Pet. App. A-231. As mentioned above, the Indiana Supreme Court then ruled that the exception applied "when there is a significant threat to [a woman's] life or health, physical and mental." *A Woman's Choice-East Side Clinic*, 671 N.E.2d at 111. This interpretation resolved in favor of the statute any questions as to the adequacy of the emergency medical exception. Pet. App. A-142-44. The District Court therefore modified its preliminary injunction such that the only provision of Public Law 187 that remained enjoined was the "in the presence" requirement. Pet. App. A-152. This meant that the required information could be given to prospective abortion patients over the telephone or through the mail, though it still had to be given at least eighteen hours before the abortion. *Id.*

4. The district court held a trial in November 1999 where it took evidence concerning, among other things, the impact of similar laws in Mississippi and Utah. Pet. App. A-84-112. On March 30, 2001, the district court made permanent and final its injunction against the "in the presence" requirement, relying principally on expert studies and testimony submitted by the Petitioners showing that, when in-person counseling laws were implemented in Mississippi and Utah, abortion rates in those states declined by about ten to thirteen percent. Pet. App. A-63; A-65; A-87; A-108; A-112; A-125. The district court also found increases in the number of Mississippi women who traveled out-of-state for abortions and in second-trimester abortions in Mississippi once the Mississippi law was implemented. Pet. App. A-85. It ruled that, because the state had come forward with no proof as to the persuasive impact of in-person counseling laws, the declines in abortion rates found in Mississippi and Utah were *a fortiori* the result of an undue burden and Petitioners did not need to "show definitively the precise mechanism by which . . . an undue burden would result from the law." Pet. App. A-111.

5. In a majority opinion authored by Judge Easterbrook and joined by Judge Coffey, the Seventh Circuit reversed and upheld Indiana's in-person counseling requirement. In summary, the court ruled that the studies from Mississippi and Utah were legally insignificant because they did not speak to the impact an in-person counseling law would have in Indiana. Indiana's law, the court held, must be judged against its actual impact in Indiana, not against a hypothetical impact derived from the experiences of two other states: "it is not possible to predict failure before the whole statute goes into force." Pet. App. A-16. In particular, the Mississippi and Utah studies did not account for factors such as "urbanization, income, average distance to an abortion clinic, average price of an abortion, and so on" that could yield different results in Indiana. Pet. App. A-11. And

whereas the district court taxed the state for failing to prove the persuasive impact of the law (Pet. App. A-113-116), the Seventh Circuit held that, because the preliminary injunction against the in-person law prevented any study of its effects in Indiana, a silent record on the issue of persuasive impact further undermined the legal significance of the Mississippi and Utah data. Pet. App. A-13. The court also ruled that Petitioners' proof was legally insufficient because it did not show that any decline in Mississippi and Utah abortions owing to the in-person requirement resulted from an impermissible substantial obstacle similar to that imposed by spousal notification, rather than merely from permissible marginal increases in the costs of obtaining abortions (or persuasive impact). Pet. App. A-16.

Judge Coffey alone authored a separate concurrence, and Judge Wood dissented. Pet. App. A-18; A-39.

REASONS FOR DENYING THE PETITION

There is no conflict among the circuits or other lower courts and no conflict with *Casey* to justify review. Petitioners' argument that the Seventh Circuit contravened *Casey* by declaring a ten percent decline in abortions not to be a "significant number" fails because only Judge Coffey's concurrence adopted that view. Further, it is implausible to posit a square conflict with *Casey* over the permissibility of pre-enforcement challenges to in-person counseling requirements because *Casey* upheld a similar Pennsylvania law. And nothing in *Casey* (or *Stenberg v. Carhart*, 530 U.S. 914 (2000), for that matter) mandates that a statistical study from one or two states can decide the fate of an abortion law in another state before that law even goes into effect. Review is unwarranted because there is nothing more here than a complaint of erroneous factual findings or a misapplication of a properly stated rule from *Casey*. *See* Rule 10, Rules of the Supreme Court of the United States.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION FROM OTHER CIRCUITS OR OTHER LOWER COURTS

There is no conflict between the decision below and a decision from another Circuit or a lower court. In fact, the Seventh Circuit's decision instead brings this case into line with every other case that has actually considered an in-person informed consent requirement under the undue burden standard since this Court explicitly upheld a similar requirement in *Planned Parenthood v. Casey*, 505 U.S. 833, 886-87 (1992).

In addition to *Casey*, courts have also upheld in-person (or two-trip) requirements enacted by Wisconsin, Mississippi, Kentucky and Utah. *See Karlin v. Foust*, 188 F.3d 446, 488 (7th Cir. 1999) (upholding Wisconsin's twenty-four hour waiting period, assuming a two-trip requirement); *Barnes v. Moore*, 970 F.2d 12, 13-15 (5th Cir. 1992) (upholding Mississippi's twenty-four hour waiting period requirement thought to require two trips to an abortion provider);* *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 453-54 (W.D. Ky. 2000) (upholding Kentucky's twenty-four hour waiting period, assuming a two-trip requirement); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1490-91, 1494 (D. Utah 1994) (upholding Utah's twenty-four hour waiting period that required two trips to an abortion clinic), *rev'd on other grounds*, 75 F.3d 564 (10th Cir. 1995).

In-person requirements have also been enacted by Florida, Louisiana and Ohio. *See* Fla. Stat. ch. 390.0111 (2002); La.

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* Since the decision in *Barnes*, the Mississippi Attorney General has opined that Mississippi's law does not actually require in-person counseling. 95 Op. Miss. Att'y Gen. 0318 (1995), *available at* 1995 WL 328978.

Rev. Stat. Ann. § 40:1299.35.6 (2002); Ohio Rev. Code Ann. § 2317.56 (2002). Ohio's law has been temporarily enjoined by agreement of the parties, but not based on any evaluation by a court. *Cincinnati Women's Servs. v. Voinovich*, C-1-98-289 (S.D. Ohio April 29, 1998). Florida's law has been enjoined by a court, but that injunction is based solely on state constitutional requirements that embody the now-federally-discarded trimester framework articulated in *Roe v. Wade*, 410 U.S. 113, 162-66 (1973), and is expressly *not* based on the *Casey* standard. *State v. Presidential Women's Center*, 707 So. 2d 1145, 1147-49 (Fla. Dist. Ct. App. 1998).

Thus, no court (aside from the district court in this case) faced with actual litigation of an in-person counseling requirement and applying the *Casey* undue burden standard has enjoined such a requirement.

II. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH *CASEY*

This case presents neither an inconsistency with *Casey* nor a new important question of federal law. *Casey* determined that in-person informed consent requirements are presumptively constitutional, and the decision below simply held that, in the absence of any evidence that Indiana's in-person law is actually having an unconstitutional effect, that requirement remains permissible. There is simply no important question of federal law calling for resolution.

A. Only One Judge Opined That Ten Percent Is Not A "Significant Number"

Petitioners' first argument is that certiorari is warranted because the Seventh Circuit somehow held that, even if an in-person requirement causes a ten to thirteen percent decline in abortions, such a decline does not represent a "significant number" of abortions. Pet. 20. As Petitioners themselves

concede (*id.*), the only such statement comes from Judge Coffey's concurrence, not from Judge Easterbrook's majority opinion. *See* Pet. App. A-39. Thus, aside from whether such a holding would conflict with *Casey* (and it would not), it is astonishing that Petitioners make this argument at all. And the fact that this is Petitioners' first argument for granting certiorari underscores the overall weakness of the Petition.

In short, Petitioners are simply incorrect in asserting that Judge Coffey's concurring opinion actually supplies a holding upon which the district court was reversed. Judge Coffey clearly states that he is "pleased to join [Judge Easterbrook's] opinion" (Pet. App. A-39), but Judge Easterbrook nowhere asserts that he joins Judge Coffey's opinion. Thus, Judge Easterbrook's opinion is the majority opinion, and it says nothing about what constitutes a "significant number" or a "large fraction" under *Casey*.

The "narrowest grounds" rule relied upon by Petitioners applies only when "a fragmented Court decides a case and no single rationale explaining the result enjoys . . . [majority] assent . . . ." *Marks v. United States*, 430 U.S. 188, 193 (1977). That rule does not apply here because Judge Easterbrook's opinion—and all of its rationales—enjoys majority assent. Judge Coffey's concurrence does not. Petitioners essentially argue that Judge Coffey has converted his concurring view into a majority holding simply by suggesting that Judge Easterbrook agrees with him, without any formal assent from Judge Easterbrook himself. For obvious reasons, that is not the way our judicial system works.

B. The Seventh Circuit Properly Applied *Casey* To Foreclose A Pre-enforcement Challenge Based On Statistics From Other States

Petitioners assert that the decision below conflicts with *Casey* because it (1) rejects a pre-enforcement challenge to the Indiana law based solely on evidence from Mississippi and Utah, and (2) somehow converts *Casey*'s "undue burden" standard into a standard "at least as deferential as rational-basis review" (Pet. 26-27) by a sleight of hand involving the level of deference given to the district court's findings. Neither contention either justifies the Court's intervention or ultimately has any merit.

1. The decision below ruled that, for a pre-enforcement challenge to Indiana's in-person counseling requirement to succeed, there must be some reliable means of applying the Mississippi and Utah study results to Indiana. Pet. App. A-10-12. Because Petitioners bore the burden of proof yet made no such showing, a successful challenge could come only *after* a period of enforcement that generates data about the actual Indiana experience. *Id.* Such a common-sense conclusion is proper because, while *Casey* permits challenges to in-person counseling laws, it in no way says that such laws are subject to challenge *before* they go into effect based on abortion rate data from two other states.

Petitioners' fundamental mistake is their implicit equating of "facial challenge" with "pre-enforcement challenge." *Casey* at some level permits facial challenges to those abortion laws it upheld, but that is not the same as permitting pre-enforcement challenges to those laws. *Casey* itself speaks of deciding a facial challenge based on a "record" related to enforcement. *Planned Parenthood v. Casey*, 505 U.S. 833, 887 (1992). And Justice Souter (one of the authors of the controlling joint opinion in *Casey*) has rejected the idea that a facial challenge to an informed-consent

requirement could succeed without proof of the law's actual effects. *Planned Parenthood v. Casey*, 510 U.S. 1309, 1311 n.3 (1994) (Souter, J., denying petition for stay of mandate). Indeed, the Third Circuit characterized such future challenges as being "as applied" challenges, and Justice Souter agreed. *Id.* (citing *Planned Parenthood v. Casey*, 14 F.3d 848, 862 n.18 & 863 n.21 (3d Cir. 1994)); *see also Karlin v. Foust*, 188 F.3d 446, 484 (7th Cir. 1999) (relying on the concurrence of Justice O'Connor in the denial of stay in *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993), for the proposition that later challenges to abortion laws upheld in *Casey* must be based on an "individualized factual inquiry" concerning the impact of the law).

In fact, challenges of the sort contemplated by *Casey*—because they seek broad-based relief yet require a showing of a law's actual effects—might more accurately be described as "operational" rather than as either "facial" or "as-applied." *See, e.g.*, Laurence H. Tribe, *American Constitutional Law* § 3-31, at 609-616 (3d ed. 2000). Whatever the proper term, it would apply as much to a challenge based on the law's effects in Indiana as it would to a challenge based on effects in some other state: A post-enforcement challenge of Indiana's abortion law is no less "facial" than a pre-enforcement challenge predicated on post-enforcement statistics from some other state. No one is suggesting that the law may be challenged only in case-by-case challenges of individual women who claim the law imposes an undue burden on them specifically but not necessarily on anyone else. *Cf. Schall v. Martin*, 467 U.S. 253, 273-74 (1984) (holding that a juvenile pretrial detention law was "not invalid 'on its face' by reason of the ambiguous statistics and case histories relied upon by the court below," but that "in some circumstances detention of a juvenile would not pass constitutional muster").

The only question is whether and under what circumstances Petitioners could succeed based solely on proving a law's effects in two other states, or whether their challenge requires them to prove the law's effects *in Indiana*. On this point, the Court reached the reasonable conclusion that, before a sovereign state's in-person counseling abortion regulation may be enjoined as imposing an undue burden, it is necessary for the law's challengers to provide evidence about the impact of the law *in that state*. Pet. App. A-17.

Petitioners' cases concerning pre-enforcement challenges to other types of abortion regulations are not to the contrary, and in fact are helpful in explaining why the decision below was correct in precluding this pre-enforcement challenge. Both *Planned Parenthood v. Lawall*, 180 F.3d 1022 (9th Cir. 1999), and *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997), invalidated parental notification requirements that did not provide for judicial bypass procedures that would sufficiently protect minors' rights according to the standards of *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (plurality opinion). Pre-enforcement challenges were appropriate in *Lawall* and *Ieyoub* because the laws could be tested solely by comparing their texts with what *Bellotti* required and without reference to the laws' actual impacts on abortion rates.

The same is true with respect to the partial-birth abortion ban invalidated in *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999), which facially proscribed procedures used for constitutionally protected abortions, and with respect to Utah's post-twenty-week abortion ban invalidated in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), which prohibited abortions beyond twenty weeks even where the fetus was not yet viable. Each of these cases presented a classic facial challenge where the texts of the laws themselves provided enough for invalidation, and examination of the actual impact of the

laws on abortion rates was unnecessary. It is true that *Jegley* relied on evidence that doctors sometimes use abortion procedures for pre-viability abortions that the Arkansas partial-birth law, on its face, prohibited. *See Jegley*, 192 F.3d at 796-97; *see also Stenberg v. Carhart*, 530 U.S. 914, 924, 928, 932 (2000) (relying on evidence that the D&E procedure is used in pre-viability abortions and that the D&X procedure is sometimes used when necessary to protect women's health). But such evidence by its nature was both available before the partial-birth laws were enforced and sufficient for facial invalidation of the laws at stake in *Jegley* and *Stenberg* Unlike the situation with an in-person counseling law, there was no need to evaluate the actual impact of the law on abortion rates in the states where the laws were in effect. Similarly, while *Jane L.* mentioned evidence that some Utah women had sought abortions beyond the twenty-week mark (102 F.3d at 1117), such evidence merely substantiated the plaintiffs' claims that some women actually would seek pre-viability, post-twenty-week abortions that were banned by the law's facial prohibitions; that is a far different inquiry than whether an otherwise facially valid in-person counseling law would nonetheless have an unconstitutional impact as proven (in part) by the impact on abortion rates. And in any event, the *Jane L.* evidence reflected the experience in Utah itself rather than some other state.

By contrast, without empirical proof of the law's effect on abortion rates, an in-person counseling requirement is perfectly valid under *Casey*. *Casey* started from the position that, "[i]n theory, at least, the waiting period [which included a two-trip requirement] is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden." 505 U.S. at 885. This means that, for a future challenge to an in-person requirement to succeed, the challengers must provide *some* proof of the law's impact,

which in turn means the law must go into force. Moreover, Petitioners' litigation strategy essentially acknowledges as much: They sought to win by proving a drag on abortions following implementation of a similar law in Mississippi, not by relying on the text of the law itself.

This case cannot, therefore, be analogized to abortion laws that were invalidated without evidence of empirical effects. Some operational proof is required, and absent proof that Indiana abortion trends will necessarily follow Mississippi and Utah trends, such an operational challenge may succeed only with evidence of the law's effects in Indiana. Nothing in *Casey* or *Stenberg* precludes such a sensible result.

2. Petitioners complain that the decision below reversed based on disagreements with the district court concerning the significance of the Mississippi and Utah studies, thereby resulting in a standard of review improperly deferential to the statute. Pet. 21-27. *Casey*'s undue burden standard, however, does not turn district courts into infallible judges of what constitutes legally sufficient proof, and a court of appeals' reversal of a district court's erroneous legal conclusion concerning the sufficiency of proof does not convert the undue burden standard into rational basis. In any event, this issue is far too convoluted to justify review.

As in all cases, Rule 52(a) of the Federal Rules of Civil Procedure and *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985), permit district courts' findings of historical fact to be reversed in abortion cases only where such findings are clearly erroneous. But the Seventh Circuit did not reverse based on disagreements concerning historical facts. *See* Pet. App. A-10 (leaving intact findings of historical fact in light of Rule 52(a) and *Anderson*). It instead reversed the district court's erroneous legal conclusion that pre-enforcement evidence from other states is sufficient to prove that Indiana's law will cause an undue burden.

In a variety of contexts, the Court has held that a district court's judgment regarding the constitutional significance of its factual findings should be reviewed *de novo*. *See, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (holding that a district court's determination of the constitutionality of punitive damages is reviewed *de novo*); *Ornelas v. United States*, 517 U.S. 690 (1996) (holding that a district court's ultimate finding of probable cause to support a search or seizure is a mixed question of law and fact that is reviewed *de novo* even though the district court's findings of historical fact are given deference). *Casey* itself accepted the district court's findings regarding the burdens imposed by a mandatory waiting period, but disagreed with the district court's determination of the constitutional significance of those facts. 505 U.S. at 885-87. Thus, the Seventh Circuit was well within its power to reverse the district court based on its disagreement concerning the legal significance of historical facts.

Further, Petitioners' criticism that the decision below replaces the district court's factual inferences concerning the Mississippi and Utah experiences with the Seventh Circuit's own inferences is unwarranted. The Seventh Circuit's plausible suggestions as to what might happen in Indiana merely explain why, as a legal matter, the results in Mississippi and Utah were insufficient. More fundamentally, under *Casey* it is entirely permissible for the Seventh Circuit to require proof that what happened in Mississippi and Utah is *bound to be* what will happen in Indiana in order for results in those two states to be significant. *Casey* does not say that all in-person laws can be invalidated if just one or two states experience declines in abortions as a result of such a requirement. At most, *Casey* permits state-by-state evaluations based on local experiences. Here, Petitioners were hoping to provide such an evaluation of the Indiana law by using Mississippi and Utah as proxies for Indiana. It

stands to reason that without evidence justifying such proof-by-proxy, such a method of proof must fail.

As with the parental notification, partial-birth, and post-twenty-week laws discussed above, *Casey*'s invalidation of spousal notification laws does not compare to in-person counseling. The *nature* of spousal notification, not empirical proof, makes that requirement *likely* to impose a substantial obstacle. *Casey*, 505 U.S. at 887-94. This is not true with in-person counseling requirements, which can be invalidated only with, among other things, empirical proof. *Id.* at 885.

What remains is not a proof scheme that somehow permits invalidation of in-person requirements based on assumptions about the common behaviors of women (or anybody else), but a scheme that permits invalidation only if, according to empirical measures, the law combines with state (or region)-specific factors to impose an impermissible substantial obstacle to abortion. *See* Pet. App. A-11; *see also Karlin*, 188 F.3d at 485-86 (suggesting that a two-trip requirement might impose an undue burden if factors such as the number of physicians and clinics available, the distances to clinics, and the income of women seeking abortions make it a substantial obstacle to abortion). As such, without conclusive proof that abortion availability and other relevant conditions are the same for women in Indiana as for women in Mississippi and Utah, it does not suffice merely to say that the impact of an in-person law in Indiana will likely be the same as in Mississippi and Utah. *See* Pet. App. A-12.

Nothing about this reasonable implementation of *Casey* equates with rational basis review. The Seventh Circuit's holding that Indiana's law should be judged by its impact in Indiana does not require Petitioners to negate every conceivable rational justification for the law. Indeed, the Seventh Circuit's standard permits invalidation of an in-person counseling law *notwithstanding* permissible rational

justifications for the law if there is proof that the law also actually imposes a substantial obstacle for a large fraction of women seeking abortions. Undue burden remains the standard; the decision below at most precludes proof of undue burden from two other states where abortion availability and other relevant factors are not necessarily the same.

C. The Seventh Circuit Properly Held That *Casey* Requires A Showing Of *How* In-Person Counseling Imposes A "Substantial Obstacle"

Entirely apart from the proper level of deference owed to the district court on the applicability of the Mississippi study to Indiana, the decision below correctly identified an independent ground for reversing the district court that Petitioners have not directly challenged: their failure to carry their burden to prove the mechanism by which any decline in Mississippi abortions occurred. *Casey* imposes this requirement because, if in-person requirements merely persuade women not to have abortions or merely impose higher marginal costs on abortions that do not amount to a substantial obstacle in some functional sense, such laws are perfectly valid. *Planned Parenthood v. Casey*, 505 U.S. 833, 886-87 (1992); *see also Karlin v. Foust*, 188 F.3d 446, 487 (7th Cir. 1999) (holding that it is not enough simply to show that the number of abortions declined; a plaintiff "must also explain *why* the law had this effect") (emphasis added); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 457 (W.D. Ky. 2000) (ruling that evidence that abortions declined did not answer the essential question of why that decline occurred).

The district court reached two erroneous legal conclusions concerning the means by which an in-person requirement might cause a decline in abortions. First, the district court rejected the possibility that the requirement could have had a persuasive effect on women in Mississippi and Utah merely because evidence concerning the impact of giving the

required information over the telephone showed no persuasive effect, because more women traveled out of state to have abortions, and because the *state* had not proven persuasive effect (which was not the state's burden in any event). Pet. App. A-113-115. Second, the district court ruled that Petitioners "do not need to show definitively the precise mechanism by which . . . an undue burden would result from the law." Pet. App. A-111.

The Seventh Circuit corrected these erroneous legal conclusions in two ways. First, the court reached the common-sense conclusion that information delivered in person could be more persuasive than information delivered over the telephone or through the mail, such that the persuasive impact of an in-person law could not be foreclosed as a cause for any decline that might occur in Indiana or elsewhere. Pet. App. A-13. This holding also carried the implicit—and correct—conclusion that it was not the state's burden to prove persuasive impact.

Second, the Seventh Circuit ruled that, indeed, Petitioners *were* required under *Casey* to show the mechanism for any perceived decline in Mississippi and Utah abortions, and that they had failed to provide that proof. The court observed that those declines might be caused either by a substantially greater likelihood that an abusive spouse, parent, or partner would intercede (an impermissible cause), or merely by adding a modest cost that tips the scales against abortion for women who are uncertain about whether to have the procedure (a permissible, because not substantial, cause). Pet. App. A-13-14. However, the court concluded, "[t]his record does not permit (and the district judge did not make) an inference either way about the reason for the decline in Mississippi and Utah." *Id.* at A-14. Continuing, the court explained as follows:

> The record in this case does not show that a two-visit rule operates similarly to a spousal-notification rule by facilitating domestic violence or even inviting domestic intimidation. It shows nothing except a decline in the number of abortions in Mississippi and Utah—leaving open both the extent to which other states would experience the same effect and the reason *why* the effect occurs.

Pet. App. A-16. Thus, it is not enough for the law to have no persuasive effect (which Petitioners have not proved in any event); a successful challenge to an in-person counseling law must also show the means by which the law imposes a substantial obstacle to abortion, a point on which the district court erred. *See* Pet. App. A-111. This is true even on Petitioners' terms because of the other permissible purposes of the law: to inform women about abortion and to ensure sound medical practice.

As *Casey* itself recognized, this remaining question—does the in-person requirement cause a decline in abortions through some constitutionally unacceptable means?—fundamentally distinguishes in-person counseling requirements from other abortion regulations in terms of permitting pre-enforcement challenges. As discussed in Part II.B., *supra*, spousal notification, parental notification, and even partial-birth abortion regulations all could be challenged before enforcement because the means by which they affect abortions is so obvious. There is no such facially transparent logic with respect to in-person counseling requirements.

Furthermore, *Casey* expressly held that the fact that an informed consent requirement requires two trips to a clinic and thereby imposes marginally higher costs on women who wish to obtain abortions does not constitute a "substantial obstacle." 505 U.S. at 886. To the extent that *Casey* left open the possibility that such marginal costs could

functionally constitute "substantial obstacles" if a district court makes the proper findings, the district court here made no such findings (as the Seventh Circuit observed). Indeed, on this score the record here is actually less favorable to Petitioners than the record in *Casey*. The *Casey* district court found that the two-trip requirement would be "particularly burdensome" on those who "have the fewest financial resources [and] those who must travel long distances." *Id.*at 886. But here the district court found that the Mississippi study showed no correlation between any decline in abortions and the economic status of women obtaining abortions (as measured by race) or the distance women lived from abortion clinics. Pet. App. A-111.

According to the express holdings of *Casey*, this is a critical missing piece of evidence. *See also Karlin v. Foust*, 975 F. Supp. 1177, 1217 (W.D. Wis. 1997) ("Without this expected correlation, one can only speculate that the additional trip is an insurmountable obstacle, rather than merely a less desirable option."), *aff'd*, 188 F.3d 446 (7th Cir. 1999). That the district court simply breezed past this gap in the evidence itself justified reversal by the Seventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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